No. 12689

In the United States Court of Appeals for the Ninth Circuit

SHEFF WHITE, ORLAND WHITE, AND JOE M. WHITE,
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE APPELLEE

A. DEVITT VANECH,
Assistant Attorney General,
HENRY L. HESS,
United States Attorney,
Portland, Oreg.
WILLIAM H. VEEDER,
Special Assistant to the Attorney General,
Washington, D. C.

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CITATIONS

Cases

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OPINION BELOW

The opinion of the district court holding in favor of the United States in the consolidated cases involving the failure to deliver water (R. 56–89) is reported in 93 F. Supp. 779.

JURISDICTION

This is an appeal from judgments (R. 98) entered June 22, 1950, in favor of the United States, dismissing on the merits the complaints of the appellants in the consolidated cases, of which the above-entitled cause was selected as a representative action. Notices of appeal were filed August 21, 1950. The jurisdic-

tion of the district court was invoked by appellants under the Federal Tort Claims Act (then cited as 28 U. S. C. 931 (a)), since reenacted and codified as 28 U. S. C. 1346 (b) and 28 U. S. C. 1402 (b). The jurisdiction of this Court rests upon 28 U. S. C. 1291.

By an order the trial court consolidated for trial 191 failure-to-deliver-water cases of which the case of *Sheff White, et al.* v. *United States* was selected as being representative (R. 89). Fifty-one of the original 191 cases were consolidated on appeal to this Court and the case of *Sheff White, et al.*, v. *United States* was selected as representative of those 51 cases (R. 793).

STATUTE INVOLVED

SEC. 1346. United States as defendant—

* * * * *

(b) Subject to the provisions of chapter 173 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

QUESTIONS PRESENTED

Where the trial court found no negligence on the part of the United States after a thorough trial of the facts, a careful reexamination of those facts as disclosed in the record, having heard the witnesses, testing their credibility by extensive questioning, and after a thorough on-the-ground investigation:

1. Whether on appeal this Court will reverse the trial court's findings of facts and conclusions of law and judgment which completely exonerate the United States of any charge of negligence.

2. Whether on appeal this Court will reverse the trial court's findings of facts, conclusions of law and judgment which held and specifically found that the evidence failed to establish that the proximate cause of appellants' alleged damage was any negligent act or omission on the part of the United States.

3. Whether on appeal this Court will reverse the trial court which held that the evidence did not establish any negligent act or omission on the part of the United States, when the sole basis for invoking jurisdiction was the allegation of negligence which was not proved.

4. Whether on appeal this Court will reverse the trial court when the trial court found affirmatively that the United States had exercised reasonable care.

5. Whether on appeal this Court will reverse the trial court when appellants having failed to prove negligence, now try to assert their rights are in contract, although they brought their actions under the Federal Tort Claims Act.

6. Whether on appeal this Court will reverse the trial court where the appellants had no contract for water with the United States and thus had no privity with it.

7. Whether on appeal this Court will reverse the trial court where the only contract which the United States had for the delivery of water specifically waived any liability on the part of the United States for the failure to supply water, the only grounds upon which these cases are predicated.

PRELIMINARY STATEMENT

For clarification purposes certain salient factors are emphasized:

1. The case of *Sheff White, et al.,* v. *United States* is a representative case of 191 cases consolidated for trial under the Federal Tort Claims Act. The sole question involved in those cases was whether there was negligence on the part of the United States in failing to deliver water for purposes of irrigation for a period commencing July 14, 1946, to July 31, 1946. Two flooding cases are in no way involved in these cases. At the time of the preparation of this brief, judgments have not been entered in those two flooding cases.

2. Judgment on the merits was entered in favor of the United States in the 191 failure-to-deliver-water cases after a thorough trial of the facts and an on-the-ground investigation by the trial court. That court found that the evidence did not establish negligence on the part of the United States.

3. Of the 191 cases involving the failure to deliver water, appeals have been taken in but 51. As in the cases consolidated for trial, the case of *Sheff White, et al.,* v. *United States* has been selected as a representative case on appeal.

4. Erroneous statements are made by appellants throughout their opening brief. Those errors constitute grievous departures from the facts as actually before the trial court. Fearing that those incorrect and garbled statements would mislead this Court, special treatment of them in this brief of the United States has been necessary. The most serious of these erroneous statements have been separately stated and designated Errors No. 1 through No. 8. At the appropriate points in the statement of facts in this brief, references are made to appellants' incorrect statements. Included in each statement respecting the errors is documentation from the record revealing the true statement of facts.

5. Reference is likewise made to the appendix made a part of appellants' brief. By stripping from the context the testimony of many of the witnesses the true facts have been frequently distorted. One method calculated to create a wrong impression of the evidence upon which the trial court found favorably for the United States, which has been used by appellants, is to select statements made by witnesses in answer to hypothetical questions having no relationship to the facts as they actually existed. To counter the method of stripping from the context certain testimony would entail a virtually complete restatement of the record.

As that needless task would be of no benefit to this Court it is respectfully requested to ignore the appendix to appellants' opening brief and look to the entire record. That record will reveal an abundance of substantial evidence from creditable witnessess to support the judgment of the trial court favoring the United States.

STATEMENT

Pursuant to its policy of making habitable large areas of the public domain in the Western States, the United States of America undertook the construction of the Owyhee Reclamation Project. That construction was in accordance with the Reclamation Act of June 17, 1902[1] as supplemented and amended. All of the lands of the appellant water users are within the Owyhee Reclamation Project. Those lands are arid and agriculture may not be successfully prosecuted on them without artificial irrigation.

To secure the repayment of the costs of the Owyhee Reclamation Project the United States, in conformity with the reclamation laws, entered into contracts with the irrigation districts comprising the Owyhee Reclamation Project.[2] There are no contracts for a supply of water between the United States and the appellants who brought suit against the United States. The appellants, however, have contracts with the irrigation districts.

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[1] 32 Stat. 388.

[2] Findings of Fact Nos. 3 and 8, R. 90, 94; Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 57.

By their contracts the irrigation districts contracting with the United States specifically covenanted that the United States would not be liable for any damages from shortages of water "on account of drought, inaccuracy in distribution, or other causes."[3] That waiver of liability for any damage for water shortages was confirmed and consented to by the appellants in their contracts with the irrigation districts.[4] Moreover, those contracts containing the express waiver of liability for any damage for water shortages, confirmed and consented to by appellants, were affirmed by the court of the State of Oregon having competent jurisdiction.[5]

One of the major structures of the Owyhee Reclamation Project is the north canal. That canal, commencing at the dam at Owyhee Reservoir, extends for a distance of 70 miles. Thousands of acres of arid lands are irrigated by the waters delivered to them by the north canal. The proviso in the contracts waiving liability for any damages on the part of the United States for shortages of water applies to the north canal. Construction of the north canal was accomplished in full conformity with the plans and specifications for the structure.[6] It was likewise built in accordance with the general practice of the

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[3] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 58; Finding of Fact No. 4, R. 92.

[4] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 58.

[5] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 58.

[6] R. 527, Testimony Oscar G. Boden; R. 475, Testimony R. J. Newell.

area. At the points here involved the width of the structure was a minimum of 14 feet at the crown or top of the lower bank.[7] The depth of the canal was 10 feet 8 inches, the depth of the water being 6 feet, and the canal bank being 4 feet 8 inches above the water level. At the points in question the water was carried in cut as distinguished from filled-in earth,[8] or as otherwise described, the water at those points in the canal was carried in virgin soil.[9] When-

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ERROR NO. 1: ERRONEOUS STATEMENT IN APPELLANTS' OPENING BRIEF

Pages 55 (2), 68, 69, 70, 82, 97. Throughout their brief appellants assert the north canal was not constructed in conformity with the plans and specifications. That is incorrect as disclosed by the testimony of Mr. Newell and Mr. Boden, the two engineers in charge of constructing the north canal. Their testimony stood unchallenged except for the incorrect and unsupported statements of appellants in their brief. See footnote immediately preceding. Equally incorrect is the assertion that the plans and specifications called for a core wall in the bank of the canal. There is no basis for that assertion. The plans and specifications called for a core bank which was in fact constructed. (R. 531, Testimony Oscar G. Boden.) Moreover, adoption of plans are discretionary acts specifically exempt from Tort Claims Act. (28 U. S. C. 2680 (a); see 56 Yale Law Journal 534, 544, 545.)

[7] R. 525–535, Tesimony Oscar G. Boden.

[8] R. 534, Testimony Oscar G. Boden; R. 672, Testimony Grant Gordon.

[9] R. 697, Testimony James Spofford.

ERROR NO. 2: ERRONEOUS STATEMENT IN APPELLANTS' OPENING BRIEF

Pages 5, 81. Misleading statements by appellants are made throughout their brief that the canal was partly in fill; that is, built up over the normal ground level. It will be observed the water in the canal was all carried in natural earth with a minimum bank at the crest of 14 feet in width. Appellants' principal expert witness Merritt testified that the method used in

ever in the construction of the north canal porous or unstable earth or material was encountered it was removed. It was then replaced by fine select material which was compacted.[10] Construction was completed and water was first turned into the north canal in

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constructing the north canal "follows the general practice." To the express question, "In other words, this is the general practice of constructing canals in the area?" that witness answered, "Yes, sir, I think so." (R. 358, Testimony Allen C. Merritt.)

[10] R. 534, Testimony Oscar G. Boden; R. 474, Testimony R. J. Newell.

ERROR NO. 3: ERRONEOUS STATEMENT IN APPELLANTS' OPENING BRIEF

Pages 5, 36, 41, 56 (6), 61 (A), 95. On the cited pages the incorrect statement is variously made by the appellants that the north canal was constructed over a porous area and was incapable of retaining water. That manifest misstatement is disproved by the evidence of the witnesses Boden and Newell who were in charge of construction of the north canal and whose testimony stands unrefuted and unchallenged in the record. Boden and Newell each testified that wherever porous material was encountered it was removed and replaced by fine select material. The fact that the north canal has been in constant use since 1935 evidences the impropriety of the declarations that the structure has been built upon and over porous material, incapable of carrying water. Moreover, as held by Judge Fee, the use of the canal for a period of eleven years resulted in it building up a protective covering within the canal. (R. 65, second paragraph, Opinion March 13, 1950, of James Alger Fee, Chief Judge; Findings of Fact Nos. 10–18, R. 95–97.) Not only is the statement that the north canal was built over porous material incapable of holding water contrary to the findings of the court, but it does violence to one's credulity, for, as stated by the man who constructed the canal, "if there had been a very porous stratum, water would have entered and found its way through in much less time than the somewhere twelve years that the canal operated successfully * * *." (R. 536–537, Testimony Oscar G. Boden.)

the fall of 1935.[11] For eleven years to the dates here important, the north canal was utilized to bring water for irrigation purposes to the appellants. During those years the canal had built up a "protective covering."[12]

Well removed from the bank and toe of the north canal were alleged "wet spots" or seep areas attributed by the appellants to the canal. However, the trial court stated it was not convinced that those "wet spots" "did not come from surface water," adding that "Experience in the irrigation country does not indicate that such circumstances would be taken as indications that a break was going to occur in the main [north] canal."[13] "* * * At a great distance from the canal"[14] were flowing springs. Those "springs were well known to the whole countryside, and if anyone had believed that they were a source of peril [to the north canal] the matter would have been taken up in protest by the landowners on whose property these appeared and other irrigators who depended on the canal for their crops."[15] Had those owners and irrigators thought the "wet spots," seep areas, or springs imperiled the north canal "the fact * * * would have been

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[11] R. 466, Testimony R. J. Newell.

[12] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 65.

[13] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 66–67.

[14] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 67.

[15] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 67.

reported to the Government and we would have had testimony that such warnings were given. There is no such testimony in the record." [16]

On Sunday, July 14, 1946, at the height of the irrigation season, the north canal was twice patrolled and the customary inspection for its protection was made.[17] Those two investigations disclosed nothing which would presage that the north canal would fail. Nevertheless, within a half hour after the last in-

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[16] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 67–68.

[17] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 68.

ERROR NO. 4: ERRONEOUS STATEMENT IN APPELLANTS' OPENING BRIEF

Pages 5, 6. Appellants erroneously assert throughout their brief that there were seep areas "immediately adjacent to the outer and lower bank of the canal"; that "obvious leaks or seeps developed in lands adjacent to the canal"; that "water soaked condition developed * * * immediately under the toe of the canal bank"; that the "land could not be plowed, nor the crops harvested by ordinary means." Categorically denied by the United States was the evidence in regard to the "wet spots" or seepage adjacent to or near the canal. As stated, the canal was patrolled twice a day. Though seepage first turns crops yellow then kills them (R. 589, 590, Testimony George N. Carter), appellants adduced evidence of harvesting the crops from the fields in question. In addition, those crops which were viewed twice daily evidenced no seepage. Equally important, though the owners of the fields were well acquainted with the ditch rider, they did not bring the alleged seepage to the attention of the ditch rider, his superior, or any official of the United States. (R. 758–760, Testimony Otto S. Pettet; R. 696, Testimony James Spofford). Judge Fee, referring to the evidence in regard to seepage, stated that it was weak and that the water alluded to by appellants was "surface water or rain." (Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 66.)

spection, and without warning, a breach occurred in the structure approximately 36 miles from the headworks, virtually the same distance from the terminus of the canal. No one observed the first break.

"The record shows that those engaged in fixing the first break took prompt and efficient methods to rebuild the canal at the point where the break had taken place."[18] Moreover, the "evidence established that at the time of making the first repair, the defendant [United States] made an investigation to ascertain the cause of the break and exercised reasonable care in that regard * * *."[19] On Thursday, July 18, 1946, by reason of the "prompt and efficient" methods pursued by the United States the engineer in charge was able to order water turned

[18] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 69.

[19] Finding of Fact No. 16, R. 96; See R. 630–632, Testimony Grant Gordon.

ERROR NO. 5: ERRONEOUS STATEMENT IN APPELLANTS' OPENING BRIEF

Pages 55 (4), 67 and generally throughout the brief. One of the most grievous and patently incorrect statements is appellants' repeated allegations that there was a total lack of inspection of the area in which the break in the north canal occurred. That statement is contrary to the court's express finding set out above, to the court's declaration in its opinion, likewise set forth above, and contrary to the express testimony of witnesses of both the appellants and the United States. (See comments above and documentation; R. 739, 741, Testimony Wiley A. Clowers; R. 239, Testimony Hubert F. Terhune; R. 605–607, 669, Testimony Grant Gordon, engineer in charge of repair.)

into the north canal.[20] Very briefly after the water had been released into the north canal it overtopped the bank.[21] After the brief overtopping the water

[20] Finding of Fact No. 9, R. 94.

[21] R. 274–277, Testimony Hubert F. Terhune; R. 608, 609, Testimony Grant Gordon.

ERROR NO. 6: ERRONEOUS STATEMENT IN APPELLANTS' OPENING BRIEF

Pages 6, 7, 65 and throughout appellants' brief. Appellants seek to in some manner relate the brief overtopping of the north canal subsequent to the time the repair was made, with the second break which occurred downstream from the first. That occurrence had no relationship with the second break. There was no causal connection established between the alleged damage to the appellants and the overtopping. As appellants' witness testified in regard to the matter in question: "I didn't connect the overflow as a break. I just termed that as an overflow." (R. 277, Testimony Hubert F. Terhune.) For a full and complete and unrefuted description of the overtopping, reference is made to R. 608, 609, Testimony Grant Gordon.

ERROR NO. 7: ERRONEOUS STATEMENT IN APPELLANTS' OPENING BRIEF

Pages 6, 7, 65, 66, 67, 97 (4), (5). Another of appellants' often-repeated erroneous statements relates to the alleged condition of the north canal when water was released into it. There was no causal connection between the condition of the repair and the second break. As stated by the trial court, the repair was made by "prompt and efficient methods." (R. 69, Opinion March 13, 1950, of James Alger Fee, Chief Judge.) More important, the repair at the time the water was released into the canal was "a reasonably even grade, yes, perhaps a reasonably grade, across the top * * * Both at the downstream and the upstream ends. * * * the general contour of the grade was on a fairly even grade and, due to the topping of the water, did not appear to be not to exceed three or four inches lower on the downstream end, as the water was a little heavier on the downstream end by perhaps three and not to exceed four inches." (R. 252, 253, appellants' witness,

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receded in the north canal and flowed normally for some period of time.[22]

Here then are the facts thoroughly tried and found by the presiding judge: (1) the north canal is a large structure 70 miles in length delivering water to irrigate and make productive thousands of acres of arid lands; (2) it was constructed by eminently competent engineers; (3) its construction conformed with the practice long adhered to in the area in which it was located; (4) for eleven years it was successfully operated; (5) twice daily it was patrolled and inspected—"inspection" which declared the court "was unquestionably adequate"; (6) yet at a point on the canal thought safe by those who were responsible for it, within a half hour subsequent to its last inspection, wholly without warning the structure failed—no one observed the failure so rapidly did it occur; (7) thereafter the north canal was repaired by "prompt and efficient methods."

Hubert F. Terhune.) More important, the second break did not occur at the point of the repair, it occurred some distance downstream. In fact, the repair subsequent to the first break, as emphasized by appellants' own witness, was "intact, with the exception of a little bit of new stuff on top, which you can't compact, which would probably amount to two or three or four inches on top that was gone, but as far as the end, I presume it was reasonably close to the end that we had left on." (R. 265, Testimony Hubert F. Terhune; see also R. 753, Testimony Wiley A. Clowers.) Moreover, at the point of the repair the canal was not several feet below the normal grade as appellants assert. (R. 645, Testimony Grant Gordon.)

[22] R. 611, Testimony Grant Gordon.

There follows a factual résumé of the "phenomenon" to which the trial court attributes the occurrences giving rise to appellants' claims against the United States. Verbatim excerpts of the testimony of Grant Gordon who enjoys outstanding eminence as an engineer, lends clarity to this phase of the consideration: "The overtopping stopped. * * * Water was passing down the canal without difficulty * * * I was standing on the downstream end of the patch watching the action both of the tractor and the water, when I heard * * * an unusual noise, turned my flashlight into the canal and noticed a vortex some three feet in diameter which had formed directly opposite from where I was standing. * * * I turned my flashlight outside of the canal to see where the water was going, noticed a heavy discharge of water from a tubular hole, I would call it, which appeared to be about two to two and a half feet diameter * * *. No portion of the water which was involved in the flow came over the top of the bank. There was no overtopping of the bank. * * * the material through which the blowup occurred was completely downstream and completely separate from any material that we had placed, the original patch." [23] At that time it was 1:30 a. m., the morning of the 19th of July. The water emanated from a hole in the bank—an emanation which took place in the natural earth of the hitherto dry canal bank, far removed from the seep concerning which

[23] R. 611, 612, 613, Testimony Grant Gordon.

appellants failed to establish any causal relation with the canal failure.[24]

To be emphasized is the fact that the second break and the first break were entirely separate. The second breach left intact the repair made in connection with the first break. As stated, the trial court found that the United States "took prompt and efficient methods to rebuild" the canal after the first break. Likewise declared by the trial court was the fact that, "At

[24] R. 754, Testimony Wiley A. Clowers; see Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 66.

ERROR NO. 8: ERRONEOUS STATEMENT IN APPELLANTS' OPENING BRIEF

Pages 5, 7 and throughout brief. Repeatedly appellants incorrectly state that the two breaks in the canal were immediately adjoining or that the broken portions joined each other. Those statements are incorrect. The breaks which occurred were in separate and distinct parts of the canal, the second break occurring downstream from the first. (Finding of Fact No. 9, R. 94; Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 58, 59.) Appellants' witness, Hubert F. Terhune, R. 263, testified as follows: "Q. Where was that hole with respect to the hole that had been washed through by the first break? A. It possibly, from the first break, possibly would have been 75 feet from the first break to the second break. * * * A. Yes, I would say that there was possibly 75 feet between the two holes." Thus appellants' own witness refutes appellants' contention that the two breaks were together. Appellants' Exhibit 82, showing two distinct washes widely separated in the area through which the water from the breaks cut their courses, reveals likewise the erroneous allegations by appellants that the two breaks occurred at the same place and were immediately adjoining. As revealed above, the repair of the first break remained entirely intact after the second break had occurred, thus disclosing that there were two separate and distinct breaks occurring in separate and distinct parts of the canal. (R. 613, Testimony Grant Gordon; R. 753, Testimony, Wiley A. Clowers.)

that time, no one knew of the weaknesses of the structure or what caused the difficulty." Continuing, the trial court stated, "It was only after the second break that the phenomenon, which unquestionably caused both breaks, was discovered." [25] A careful examination of the facts is warranted respecting the phenomenon to which the court refers. For those facts explain how a structure of the nature of the north canal would fail without previous warning. That phenomenon was a defect in a stratum of earth situated some four feet beneath the floor of the north canal at the point of the break.[26] To locate the defect it was essential to make extensive excavation with heavy equipment.[27] The layer itself was some three or four feet thick and in making the second repair it was essential to remove earth to a depth of upward to eight feet.[28] Actual cause of the failure came about by reason of the collapse of this hidden stratum, "it lost its homogeneity, it broke down structurally." [29] Having located the defective stratum which had caused the difficulty the United States proceeded expeditiously to repair the second break. By July 31, 1946, the north canal was being operated at full capacity.[30]

During the period from July 14, 1946, to July 31, 1946, water failed to reach the lands of the appellants

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[25] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 69.

[26] R. 614–615, Testimony Grant Gordon; R. 571, Testimony George N. Carter.

[27] R. 620, Testimony Grant Gordon.

[28] R. 620, Testimony Grant Gordon.

[29] R. 618, Testimony Grant Gordon.

[30] Finding of Fact No. 9, R. 94.

and other water users situated below the breach in the north canal. Suits were instituted against the United States, pursuant to its waiver of sovereign immunity respecting tort actions,[31] by 191 of those water users including appellants. Their claims were based upon the alleged failure to deliver water by reason of the failure of the north canal. Simply stated, the sole charge against the United States was that water did not reach their lands. No trespass, no flooding, no seepage, no encroachment upon their lands is charged in these cases against the United States, nor was there any involved. Two flooding cases involving wholly different principles of law were likewise brought against the United States. As yet in the flooding cases no findings of fact, conclusions of law or judgments have been entered. Trial of the failure-to-deliver-water cases followed the entry of a comprehensive pre-trial order which delineated the scope of the proceedings and established the course which those proceedings were to take. The actual trial of the issues commenced June 9, 1948, and concluded June 17, 1948. Highly important is the fact that the trial court made a thorough on-the-ground investigation of the north canal, the area served by that structure, and viewed the terrain in which it was located. On March 13, 1950, the court filed its opinion holding in favor of the United States. Subsequently, after extensive conferences with counsel for the appellants and for the United States, there was entered on June 22, 1950,

[31] 28 U. S. C. 1346 (2).

findings of fact, conclusions of law and judgment for the United States. That judgment, denying the relief prayed by the appellants and dismissing their complaints, was on the merits. It is that judgment which the appellants now seek to have reversed by this Court. No objections were filed by the appellants to the findings of fact upon which the judgment for the United States is premised.

ARGUMENT

I

The evidence does not establish that the proximate cause of plaintiff(s)' [appellants'] alleged damage was caused by any negligent act or omission on the part of the defendant [United States] [32]

That declaration by the trial court constitutes a complete exoneration of any liability on the part of the United States respecting the claims of appellants now before this Court. There follows a review of the specific findings of the trial court and the abundance of substantial evidence in support of them. It is respectfully submitted, they preclude a reversal of the judgment on the merits in favor of the United States as here prayed by the appellants. At the outset of this phase of the matter reference is first made to the applicable rules of court and decisions which govern under the circumstances presented.

> * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the wit-

[32] Conclusion of Law No. 3, R. 97.

> nesses. * * * If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.[33]

That principle enunciated in the preceding quotation accords with the rule prevailing at the time of the adoption of the Rules of Civil Procedure, with the then prevailing equity practice.[34] This Court, adhering to the principle set forth above, succinctly and in terms precisely in point respecting this case, declared:

> "The appellant does not assert that the findings of fact are unsupported by competent evidence, but contends that they are contrary to the weight of the evidence. The trial court made its findings after an evidently careful and painstaking investigation of the testimony and the exhibits, and after a personal inspection of the mining properties. We have examined the record sufficiently to see that the findings are all supported by the credible testimony of reputable witnesses. Upon settled principles, which this court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal." [35]

Affirming this Court's opinion, the Supreme Court of the United States, quoting from an earlier decision, stated: "It is our duty to accept a finding of

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[33] Amendments to Rules of Civil Procedure for the District Courts of the United States, Rule 52 (a).

[34] H. R. Document No. 588, 75th Congress, 3d session, notes to the Rules of Civil Procedure.

[35] *Butte & Superior Copper Co.* v. *Clark-Montana Realty Co. et al.*, 248 Fed. 609, 616 (C. A. 9, 1918).

fact, unless clearly and manifestly wrong.''[36] Findings of fact entered by the trial court and its opinion on every factor involved in the cases sustain the judgment entered by the trial court. Each finding of fact, each holding in the opinion are sustained by an abundance of substantial evidence. Few issues of fact were tried more carefully by a court. There are few instances in which a trial court has scrutinized more carefully the facts involved or made a more thorough on-the-ground investigation. Findings were made by the court upon each of the salient factors—construction, inspection, operation and maintenance, investigation prior to repair, repair, and the fact that at no time did the United States have knowledge which would cause it to anticipate that the north canal would fail in the areas in which it did. On each of the propositions the United States exercised the care which the law imposes upon it under the circumstances—in each instance the trial court held in favor of the position taken by the United States.[37]

(a) Construction

Undisputed testimony by witnesses of the appellants and the United States established beyond question that the north canal was constructed in accordance with the established practice of the area.[38] Appellants' principal expert declared that the north

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[36] *Butte & Superior Copper Co.* v. *Clark-Montana Realty Co., et al.*, 249 U. S. 12, 30 (1918).

[37] Findings of Fact and Conclusions of Law, R. 89–97.

[38] R. 464, Testimony R. J. Newell; R. 766–767, Testimony Henry L. Seanger.

canal was constructed in conformity with the general practice of the area.[39] Eleven years of use of the canal, stated that expert of appellants, evidenced the reasonableness of the methods used by the United States in constructing the north canal.[40] Observed in passing are the erroneous and confused statements by appellants to the effect that the United States had failed to comply with the plans and specifications for constructing the north canal. Similarly erroneous statements are made relating to the requirements for the construction of a core bank or core wall. That matter has been completely reviewed in Error No. 1, supra, page 8. There it is pointed out that the plans and specifications for the north canal called for a core bank which was constructed. They did not require the construction of a core wall. By the documentation in that Error there is refuted the groundless assertion of appellants on the subject.

Confronted with specific findings of the trial court against them on all phases of the case, the appellants seek to represent to this Court that the north canal was constructed over loose or porous material incapable of holding water. Unrefuted testimony dissipates that erroneous statement. Common sense dictates that a canal the size of the north canal could not conceivably have stood for eleven years over a foundation of loose, porous material. Judge Fee who made an on-the-ground investigation tested with searching questions the witness in charge of construct-

[39] R. 358, Testimony Allen C. Merritt.

[40] R. 376, Testimony Allen C. Merritt.

ing the north canal. He questioned specifically as to the methods pursued and precautions taken when so-called porous material was encountered in the canal. Judge Fee elicited this testimony from the witness on the subject: "* * * wherever we struck a so-called porous stratum, or what we thought was so, we dug it out and put selected fine material in." Continuing, that same witness stated: "* * * it is inconceivable to me that, with the number of employees, including myself, making constant inspection of the work, that we would have overlooked any place that appeared to be a so-called porous stratum. If we had seen it we would have overdug and filled in." That same witness who constructed the canal, made this terse and complete answer to the question of what would have resulted had the canal been constructed over a porous area: "* * * if there had been a very porous stratum water would have entered and found its way through [the canal] in much less time than the somewhere twelve years that the canal operated successfully before this break occurred."[41]

Moreover, appellants' own witness lays bare the manifestly incorrect statements of appellants made throughout their brief that the north canal was constructed over porous material incapable of holding water.[42] Judge Fee's holding was justified that eleven years of use of this canal would lead persons charged with only the duty of ordinary care to believe that

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[41] R. 534 et seq., 536–537, Testimony Oscar G. Boden.

[42] Appellants' Opening Brief, p. 95 (2); R. 358, 376, Testimony Allen C. Merritt.

the "construction was proper * * *."[43] Judge Fee was likewise justified beyond question in finding that the appellants failed to prove that the United States did not "exercise reasonable care at all times * * * in the construction * * * of the north canal."[44] Not only did the trial court make that finding but, as stated, expressly held that the evidence does not establish that the proximate cause of the alleged damage "was caused by any negligent act or omission on the part of the defendant [United States]."[45] Consequently, there is no basis for departing from the principle as enunciated by this Court that under the circumstances here presented those findings are "conclusive upon this appeal."[46]

(b) Inspection

Incredibly inaccurate statements are made in appellants' brief respecting the construction of the north canal. Those inaccuracies are refuted by the trial court's findings and the evidence upon which they were predicated. Equally inaccurate statements are made in that brief in regard to the inspection and the means of inspection adopted by the United States to preserve the north canal.[47] Respecting the inspection of the north canal the trial court declared: "It

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[43] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 65.

[44] Findings of Fact Nos. 13, 18, R. 95, 96.

[45] Conclusion of Law No. 3, R. 97.

[46] *Butte & Superior Copper Co.* v. *Clark-Montana Realty Co., et al.*, 248 Fed. 609, 616 (C. A. 9, 1918).

[47] See Error No. 5: Erroneous Statement in Appellants' Opening Brief, set forth *supra*, p. 12.

is not contended that there was no inspection. This, of course, would have been contrary to fact. There was positive evidence that inspection was carried on regularly twice a day, and that within one-half hour of the break the inspector passed over the road on the bank of the canal and saw nothing which would lead him to believe that a break was imminent. This is shown to have been the usual custom of the Government in regard to inspection. It was unquestionably adequate to fulfill the duty of exercise of ordinary care."[48] That statement by Judge Fee in his opinion was in complete accord with the findings of fact and conclusions of law which he has entered and upon which judgment for the United States was predicated. The trial court held specifically that the United States had met the duty incumbent upon it in its inspection of the north canal.[49]

Twice daily the north canal was patrolled by a ditch rider who had been so employed for twenty years. For nine years he had patrolled the particular segment of the canal that failed. That ditch rider had, a half hour before the breach took place, investigated the area which failed and, as the trial court states, found nothing "which would lead him to believe that a break was imminent."[50] Moreover, the engineer in charge of the north canal had in the

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[48] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 68.

[49] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 69; Findings of Fact Nos. 14, 18, Conclusions of Law, R. 95, 96, 97.

[50] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 68; R. 757–760 Testimony Otto S. Pettet.

fall of 1945 immediately preceding the failure, made a thorough investigation of the area of the canal here in question. That investigation revealed no weakness in the structure, rather the structure was lined with "good tight silt." [51] Those facts stand unchallenged and unrefuted in the record. Appellants' attacks on the competence of those who made the investigations are baseless. They offered no evidence that those investigations were not sufficient or that those who performed the investigations were not qualified. To allude again to the trial court's opinion: "It might be contended that the inspector employed was not competent, but there has been no attack upon that basis. * * * In view of the nature of the duties, however, the Court determines that the inspection made was sufficient." [52]

Manifestly, therefore, the trial court was correct in holding in regard to inspection, as set forth above, that: "Therefore, as far as the inspection is concerned, the Court holds that it met the duty incumbent upon the Government * * *." [53] Under the circumstances, therefore, it is respectfully submitted there is no basis in law upon which the trial court's findings may be reversed upon appeal.

(c) Operation and maintenance

"The Court believes the operation of the canal at full head at a time when everyone was crying for

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[51] R. 692, 693, Testimony James Spofford.

[52] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 68.

[53] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 69.

water was in the exercise of ordinary care.'' [54] Thus the trial court, having emphasized the long period of operations of the north canal, defeats at their inception the attacks of appellants upon the method of operating the north canal. Specifically, the trial court found: ''Respecting both the first and second breaks of the north canal the plaintiff(s) [appellants] failed to prove that the defendant [United States] did not use reasonable care in the * * * maintenance, [and] operation'' of the north canal.[55] Repeatedly the appellants make reference to the presence of seepage in the area in question. Yet, as will be subsequently emphasized, appellants fail to cite a single authority to the effect that seepage in failure-to-deliver-water cases is any evidence of negligence. More important, however, is the fact that: ''It is a matter of common knowledge that drainage goes hand in hand with irrigation and is a concomitant part of such operation.'' [56] An equally authoritative statement recognizing that seepage is the normal and usual result of irrigation is as follows: ''It has been held that it is the general rule of large ditches that seepage usually exists from their headgate along down their line * * *. All irrigation canals must of necessity seep more or less * * *.'' [57] Appellants' own expert witness readily admitted on direct examination that seepage is prevalent in the system owned

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[54] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 66.

[55] Finding of Fact No. 18, R. 96, 97.

[56] *Kaylor* v. *Recla*, 160 Ore. 254, 84 P. 2d 495, 497 (1938).

[57] Wiel, Water Rights in the Western States, 3d ed., vol. 1, sec. 488, pp. 526, 527.

and operated by the irrigation district which employs him. This excerpt from the testimony bears out that proposition:

> Q. And what is the nature of the problems that you have to meet in the King Hill Project?
>
> A. Similar to that condition that exists right there.
>
> Q. Did the King Hill people have a lot of leakage in their project for some time?
>
> A. They have had a lot and do have at the present time.[58]

Thus the evidence adduced by appellants' own witness discloses that seepage is a usual occurrence when structures of the nature here under consideration are involved. Certainly the presence of seepage does not presage failure in a canal. For, as stated by Judge Fee: "The opinion of the experts seems to accord the experience of the irrigation country that the suspiration of a canal is apt to denote a healthy condition." [59]

In regard to the trial court's last statement and its specific finding that there was a failure to prove that the United States had not properly operated and maintained the canal, particular references to the record are fully warranted. Accordingly, this Court's attention is invited to the careful analysis of Judge Fee respecting the presence of seepage as disclosed in the record.[60] Similarly, reference is made to ex-

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[58] R. 412, Testimony of James W. Bouton.

[59] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 67.

[60] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 66, 67.

pert testimony in the record regarding seepage and the fact that its presence does not presage a canal failure, but rather, as the trial court states, denotes a healthy condition.[61] Repeated erroneous statements of the appellants may not change that fact.

Correct beyond question, therefore, are the findings of the trial court in regard to the operation and maintenance of the north canal by the United States. On appeal, it is respectfully submitted, those findings should not be reversed.

(d) Investigation prior to repair

"The record shows that those engaged in fixing the first break took prompt and efficient methods to rebuild the canal at the point where the break had taken place."[62] That statement in the opinion comports fully with the specific finding of the trial court as follows: "The evidence established that at the time of making the first repair, the defendant [United States] made an investigation to ascertain the cause of the break and exercised reasonable care in that regard; and that at the time the first repair was made, the defendant [United States] did not know the cause of the first break, and that defendant [United States] did not know of anything that would cause it to anticipate the occurrence of the second break."[63] Extended comment is not required to eliminate from

[61] R. 777–781, Testimony Henry L. Senger; R. 412, Testimony James W. Bouton (witness for appellants); R. 506–509, Testimony R. J. Newell.

[62] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 69.

[63] Finding of Fact No. 16, R. 96.

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consideration the baseless contention of appellants that there was a lack of inspection to ascertain the cause of the first break. In that regard reference is made to Error No. 5, *supra.*[64] There it will be observed that witnesses for both the appellants and the United States testified that there was in fact a thorough investigation prior to the time the repair was made. Suffice to say there was a thorough investigation, the court so found on an abundance of substantial evidence from creditable witnesses and on that evidence exonerated the United States of appellants' charges of negligence. For reasons previously discussed there should be no reversal on appeal of the express findings of Judge Fee that "at the time of making the first repair, the defendant [United States] made an investigation to ascertain the cause of the break and exercised reasonable care in that regard; * * *."[65]

(e) Repair

Alluded to previously was the trial court's statement that the United States took "prompt and efficient methods to rebuild * * * the north canal." Specifically, in regard to the matter, the trial court found: "The evidence established that the defendant [United States], acting in an emergency, took prompt and efficient methods to rebuild and repair the north canal subsequent to the first break, and reasonable care was exercised to determine the cause of said

[64] Supra, page No. 12.

[65] Finding of Fact No. 16, R. 96.

break, and the work of repair of the break was done and completed promptly, with reasonable care and in a good workmanlike manner."[66] A more conclusive finding on the subject is difficult to perceive. Appellants have sought to convey the inference that the first and second failures of the north canal were at the same point or at points immediately adjoining. That is incorrect. As previously discussed, the breaks involved separate areas of the canal. For a full review of the facts relating to the separate breaks in the canal please refer to Error No. 8, *supra*.[67] Similarly the appellants aver that the repair was not completed at the time the water was turned into the segment and that too large a head of water was released at that time resulting in the second break. That statement is likewise refuted by testimony diametrically opposed to the contention. In that regard, please consider Error No. 7, *supra*.[68] Each of the groundless assertions of appellants respecting the method of repair, condition of the canal, and release of water into the canal, are refuted by the one salient fact—the first repair after the second break was intact. That fact was testified to by witnesses for the appellants,[69] and for the United States.[70] On appeal, therefore, there is no basis for reversing the trial court's finding that the United States in making

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[66] Finding of Fact No. 15, R. 96.
[67] Page 16, supra.
[68] Page 13, supra.
[69] R. 265, Testimony Hubert F. Terhune.
[70] R. 753, Testimony Wiley A. Clowers.

the repair acted promptly, efficiently, with reasonable care and "in a good workmanlike manner."[71]

(f) At no time had the United States knowledge that would cause it to anticipate that the north canal would fail in the areas in which it did

From the findings of fact exonerating the United States from fault the conclusion of the trial court necessarily followed that: "The evidence does not establish that the proximate cause of plaintiff(s)' [appellants'] alleged damage was caused by any negligent act or omission on the part of the defendant [United States]."[72] Consequently, judgment on the merits for the United States was the logical sequitur and, as emphasized, that judgment was entered. There is an additional factor of importance, however, which, due to the repeated incorrect statements of appellants respecting the cause of the failure of the north canal, warrants brief review. That factor relates to knowledge of the cause of the breaks. On the subject the court found: "The defendant [United States], based on its knowledge of the construction, operation, and maintenance of the canal under its system of inspection, was not bound to anticipate the breaks * * *."[73] Appellants, in seeking to have reversed Judge Fee's express finding that there was no evidence which would cause the United States to antic-

[71] Finding of Fact No. 15, R. 96.
[72] Conclusion of Law No. 3, R. 97.
[73] Finding of Fact No. 14, R. 95.

ipate the failure of the north canal, refer to two previous breaks.[74] Those two breaks were very minor in character and situated 10 and 30 miles respectively from the occurrences here involved. Two minor breaks in over 11 years of operation in a structure 70 miles in length at points 10 and 30 miles from the segment that failed demonstrates conclusively the integrity with which the north canal was constructed. That fact renders ridiculous the repeated assertions of appellants that the north canal was constructed over "loose and porous material" incapable of holding water.

Likewise found by the trial court was the fact that: "at the time the first repair was made, the defendant [United States] did not know the cause of the first break, and that defendant [United States] did not know of anything that would cause it to anticipate the occurrence of the second break."[75] Moreover, the court found that: "The evidence adduced by defendant [United States] established that subsequent to the second break, there was discovered situated beneath the floor of the canal a weak stratum of earth

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[74] Appellants' Opening Brief, p. 84. As the method of presentation in the appendix of appellants' opening brief may be misleading to the Court, it is respectfully requested that the Court consider the entire record on the matter—R. 467, 468, 484, 485. Thus, as indicated, over a period of eleven years, there were only two very minor, widely separated breaches in this structure which is 70 miles in length.

[75] Finding of Fact No. 16, R. 96.

formation."[76] Alluding to that unknown stratum situated far below the floor of the canal, against which the United States could not guard, the trial court stated: "At that time [when repair of the first break was made], no one knew of the weaknesses of the structure or what caused the difficulty. It was only after the second break that the phenomenon, which unquestionably caused both breaks, was discovered."[77] Those findings quoted above are premised upon an abundance of substantial testimony by creditable witnesses.[78] Appellants do not deny that there is evidence to support the findings—to do so would be a departure from actuality. They, like the appellants in the decision of this Court cited earlier,[79] simply state that they disagree with the court's appraisal of the evidence. To have reversed the express findings of fact there must be a demonstration that the trial court was clearly in error. Even the incorrect statements upon which appellants principally rely fall far short of proving that Judge Fee was clearly in error in his findings. For, as repeated, every finding of the court is supported by substantial evidence from creditable witnesses and there is no basis in law for reversal on appeal.

The authorities cited by appellants in attacking the trial court's findings are not in point. In view

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[76] Finding of Fact No. 17, R. 96; R. 614, 615, 618, 620, Testimony Grant Gordon; R. 571, Testimony George N. Carter.

[77] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 69.

[78] Please refer to statement of facts, *supra*, page 17.

[79] *Butte & Superior Copper Co.* v. *Clark-Montana Realty Co., et al.*, 248 Fed. 609, 616 (C. A. 9, 1918).

of the thorough on-the-ground investigation, the careful examination of the testimony, and the substantial evidence of creditable witnesses, there is manifestly no basis for asserting the findings of the trial court are "clearly erroneous."[80] The citation of authorities to the effect that findings may be reversed respecting testimony which is "all one way, and is not immaterial, irrelevant, improbable * * *" or which is uncontradicted or unimpeached has no bearing here.[81] To assert that those authorities are applicable in this case where the trial court has made findings in favor of the United States on every facet simply discloses weakness on appellants' part. Such obviously baseless assertions respecting the applicability of those authorities must be relegated to the same status as the baseless assertion that the north canal was constructed over loose, porous material "incapable of holding water." Statements of that character respecting a structure 70 miles in length which for 11 years served the Owyhee Reclamation Project, which was at the time it was viewed by the trial court, and, as this Court will no doubt take judicial notice, is still serving that area, casts doubt on all statements made in appellants' brief. Worthy of note in conclusion is the fact that the expert testimony relied upon by the appellants to reverse the trial court's findings was elicited from witnesses who had not seen the north canal until two years subsequent to the time the canal had been restored to

[80] See Appellants' Opening Brief, p. 98.
[81] See Appellants' Opening Brief, pp. 99–100.

full operation.[82] The trial judge made his on-the-ground investigation at approximately the same time as those "experts" made their investigation upon which they premised their conclusions to purely hypothetical questions. Thus Judge Fee who presided, had ample opportunity in the course of the trial to weigh the credibility of appellants' witnesses and those of the United States. Judge Fee rejected the conclusions of the witnesses of appellants and sustained those of the United States. Consonant with the repeated declarations of the highest Court of the United States, these authoritative statements have been made: "The question of credibility of witnesses and the weight to be given their testimony is exclusively within the province of the trial court; the province of the appellate court is to determine whether there is any evidence from which the trial court might properly have drawn its conclusion." [83] "In the review of a judgment of the trial court based upon findings made by that court, all reasonable presumptions are to be indulged in favor of the correctness of the findings. Testimony in the record which tends to support them must be accepted as true and must be viewed most favorably to the conclusions or findings of the court below. The appellate court must indulge the strongest inference in favor of the finding that the evidence will reasonably warrant, deeming every material fact established which the evidence tends to prove." [84]

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[82] R. 292, Testimony Allen C. Merritt; R. 413, Testimony James W. Bouton.

[83] 3 Am. Jur., Appeal and Error, sec. 896, pp. 458–459.

[84] 3 Am. Jur., Appeal and Error, sec. 897, pp. 461–462.

Confronted with findings of fact squarely against them, appellants attack the opinion of the trial court and those findings.[85] They do not offer references to the record to sustain their attack. They do, however, allude to testimony of the witnesses of the United States regarding the deeply embedded stratum which caused the difficulty. Omitted from their assertions though is the fact that the stratum in question was not known to the United States until after the second break.[86] In attacking the statements of the trial court that seepage does not evidence weakness in the structure, appellants refer to testimony of witnesses for the United States. Appellants state that those witnesses testified that the presence of seepage is a cause for alarm. At no time did the witnesses in question make such statements. To the contrary, they testified that seepage of the character involved was usual and did not evidence weakness.[87] The selected excerpts of testimony which appellants set forth in no way support their conclusions. What appellants have done is to cite hypothetical questions raised on cross-examination and seek to represent to this Court that those were the facts of the case. The questions, it will be observed, were premised upon "assumptions." Assumptions of fact that were not proved and did not exist. Similarly, on the pages in question, the appellants refer to a reservoir in the canal bank.

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[85] Appellants' Opening Brief, pp. 100–106.

[86] Finding of Fact No. 16, R. 96; see R. 618–620, Testimony Grant Gordon; R. 571, Testimony George N. Carter.

[87] R. 506, Testimony R. J. Newell; R. 581, Testimony George N. Carter; R. 412, Testimony James W. Bouton.

There was no proof of a reservoir in the canal bank. In fact, appellants' own witness refused to state that there was a reservoir in the bank.[88] To contend that a reservoir existed in the canal bank is as absurd as the contention of appellants that the north canal was constructed over loose porous material incapable of holding water. That contention respecting a canal which down through the years has served and continues to serve thousands of irrigated acres simply shows desperation on the part of the appellants who have failed to prove negligence but seek by any means available to have reversed the trial court.

Again, seeking to represent a situation which did not exist, appellants state that in the first repair porous structures were encountered. That is incorrect. All the earth was removed to where the remainder was "so hard and firm we could not move it."[89] Appellants having nothing to sustain their incorrect statement, cite their Exhibit 80. That exhibit was prepared, two years after the repair was made and the canal had been in operation for that period, by a witness who had never seen the canal prior to that time. That witness could not know the situation as it existed and the exhibit was pure conjecture.[90] The inability of appellants' witnesses to defend the conjectures upon which that Exhibit 80 was premised was disclosed in cross-examination. As the trial court commented in denying a motion to strike that

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[88] R. 360, Testimony Allen C. Merritt.

[89] R. 740, Testimony Wiley A. Clowers; see Error No. 5 supra, page 12.

[90] R. 114, 117, Testimony Paul Bronken.

indefensible Exhibit 80: "Oh, denied. He is trying to prove a thesis. As he says, it is for diagrammatic purposes and to illustrate his theory. * * * As to whether I agree with that theory or not is a different matter."[91] The dispositon of the case by the trial court reveals that the theory was rejected.

Reference has already been made to appellants' incorrect statements respecting core walls to which they again allude. In that regard see Error No. 1 *supra,* page 8.

Appellants seize upon the trial court's statements that had anyone in the area thought that the north canal was imperiled they would have given warning. The record shows no such warning was given. Attacking Judge Fee's observation, appellants carefully avoid reference to the fact that the canal was patrolled twice daily and had been most thoroughly investigated for any sign of weakness. Thus the trial court was eminently correct in holding that the United States fulfilled the duty respecting investigation which was incumbent upon it. Equally correct is the finding by the trial court that the situation which existed was not such as would cause a reasonable man to anticipate that the canal was in danger.[92] Like other attacks upon the trial court, the one in question is without merit.

Finally, appellants attack the trial court for declaring the fact that the north canal had been success-

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[91] R. 373, 374, Comments by Judge Fee; Testimony Allen C. Merritt appellants' chief expert.

[92] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 68, 69; Finding of Fact No. 16, R. 96.

fully operated for eleven years evidenced that it was properly constructed. Ignored by appellants is the fact that their own expert witness testified that the north canal was constructed in accordance with the practice adhered to in the area. Likewise ignored is the testimony by that same witness of appellants that the fact the canal had been operated for eleven years evidenced that the methods used in construction were reasonable under the circumstances.[93] Moreover, the trial court not only found that there was no negligence in construction, it likewise found that there was no evidence of negligence in regard to inspection, operation and maintenance, investigation prior to repair, and repair. Finally the trial court found the United States had no knowledge which would cause it to anticipate the failure of the north canal. Each of those findings is separately reviewed above. Each, as revealed, is supported by substantial evidence from creditable witnesses. Those findings cover every aspect of the case and exonerate completely the United States of any charge of negligence. Here the trial court heard the testimony, made an on-the-ground investigation and had the opportunity to test the credibility of the witnesses. As recently stated by the Supreme Court of the United States: "We believe that the evidentiary facts afford an adequate basis for the inferences drawn by the Court in making such additional findings. * * * The Circuit Court of Appeals' rejection of those findings cannot rest on the conflicting testimony of petitioner's witnesses. The

[93] R. 358, 376, Testimony Allen C. Merritt.

District Court heard the witnesses, and was the proper judge of their credibility."[94] Clearly the findings are correct and should not be reversed on appeal.

II

As the evidence did not establish that the proximate cause of the damage was caused by any negligent act or omission on the part of the United States, the trial court properly entered judgment for the United States

The findings of the trial court and the evidence upon which they were premised exonerated the United States from liability to the appellants. The evidence did not establish that the proximate cause of the alleged damage was any negligent act of the United States. Thus appellants are precluded from recovery. That conclusion is based upon the tenet of the law that: "No action for negligence can be maintained unless the breach of duty has been the cause of the damage. * * * Causal relation—the connection of cause and effect—must be established."[95] "Causal connection in law, as the term is applied relative to negligence and resultant injury, has long been referred to as the rule of proximate cause."[96] As succinctly stated by the Supreme Court of the State of Oregon: "Proof of negligence alone does not give rise to a cause of action, but the negligence com-

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[94] *Walling* v. *General Industries Co.*, 330 U. S. 545, 550 (1946); see also *Warren* v. *Keep*, 155 U. S. 265 (1894); *Furrer* v. *Ferris*, 145 U. S. 132 (1892); *Tilghman* v. *Proctor*, 125 U. S. 136 (1888).

[95] Shearman and Redfield on Negligence, rev. ed., vol. 1, sec. 33, p. 91.

[96] Shearman and Redfield on Negligence, rev. ed., vol. 1, sec. 34, p. 92.

plained of must have been the cause of the injury."[97] In full recognition of the general rule enunciated above, the Supreme Court of the United States commented: "The negligence complained of must be the cause of the injury."[98] To re-emphasize: "* * * before an act of negligence can be said to be the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of such act of negligence."[99]

As appellants failed to establish that any act or omission on the part of the United States was the proximate cause of their alleged damage they are precluded from recovery under the precepts of the law of negligence just reviewed. Though a great deal of appellants' evidence related to the presence of seepage, they failed entirely in any way to establish a causal relationship between that seepage and the failure of the north canal. To the direct question of the trial court as to whether the seepage on the Hust place, on which appellants place great reliance,[100] had "anything to do with this situation [the break in the canal]?" appellants' expert responded "Well, there is a possibility."[101] Likewise responding to the inquiry by the trial court as to the source of the spring on the Hust place, the same witness responded, "Well, I couldn't tell. It is a spring and evidently comes from

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[97] *Cosgrave* v. *Tracey*, 156 Ore. 1, 13, 64 P. 2d 1321 (1937).

[98] *A. T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 351, 354 (1929).

[99] Shearman and Redfield on Negligence, rev. ed., vol. 1, sec. 35, p. 94.

[100] Appellants' Opening Brief, pp. 5, 80, 81, 86.

[101] R. 407, Testimony, Allen C. Merritt.

the formation."[102] Certainly the replies to the court to these direct and pertinent questions in regard to the causal relation between the break and the seepage in question brought forth equivocal responses. Clearly the witness does not assert, nor is there grounds for asserting, that the seepage on the Hust place had any causal relation with the break. Further, to have evidentiary value the witness is required to testify that the seepage on the Hust place "probably" had causal connection with the break rather than the statement that there was a "possibility" of some relationship between the break and the seepage on the Hust farm. That statement is premised on the well-established principle that: "An expert's opinion must be in terms of the certain or probable, and not of the possible."[103] This view has been adopted in many recent cases.[104] A correlative proposition is the firmly established tenet of the law that: "One is not responsible for consequences which are merely possible, but only for those which are probable * * *."[105] That is clearly the rule in the State of Oregon.[106] By reason of the general acceptance of the fundamental principle which has been stated, further citation of authority on the proposition is unnecessary.

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[102] R. 406, Testimony, Allen C. Merritt.

[103] 20 Am. Jur., Evidence, sec. 795.

[104] *Perkins* v. *Nashua Mfg. Co.*, 91 N. H. 211, 16 Atl. 2d 700 (1940); 1947 Pocket Supplement Wigmore on Evidence, vol. 7, sec. 1976. See also comments on use of term "possibility" by expert witness, *Butte & Superior Copper Co.* v. *Clark-Montana Realty Co., et al.*, 248 Fed. 609, 617 (C. A. 9, 1918), affirmed 249 U. S. 12.

[105] Shearman and Redfield on Negligence, rev. ed., vol. 1, p. 94, sec. 35.

[106] *Aune* v. *Oregon Trunk Co.*, 151 Ore. 622, 51 P. 2d 663 (1935).

Appellants failed entirely to establish any causal connection between the other seepage concerning which they adduced evidence and the failure of the north canal. Thus it has no relevance here. For, as stated, "Causal relation—the connection of cause and effect—must be established."[107] Moreover, "Merely to show a connection between the negligence and the injury is not sufficient to establish liability for negligence. The connection must be such that the law will regard the negligent act as the proximate cause of the injury."[108] Proximate cause has been defined as follows: "The proximate cause of an injury is that cause, which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred."[109] Assuming solely for purposes of discussion that the alleged seepage existed and the seepage constituted negligence, plaintiffs have nevertheless failed to establish actionable negligence against the United States. They adduced no evidence that the seepage caused the north canal to fail. Having failed to establish causal connection between the seepage concerning which appellants adduced evidence and the break in the north canal, that evidence, it is repeated, is irrelevant.

Here it is essential to allude to the many cases cited by appellants to support their contention that the trial court erred in entering judgment for the United

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[107] Shearman and Redfield on Negligence, rev. ed., vol. 1, sec. 33, p. 91.

[108] 38 Am. Jur., Negligence, sec. 27.

[109] 38 Am. Jur., Negligence, sec. 50.

States.[110] Every case and authority cited by appellants involved alleged injury by reason of seepage or overflow. Those authorities are not in point. These are not seepage or overflow cases. Here there is no encroachment of water, no trespass, no intrusion of water upon the lands of appellants. These are cases where damage is claimed by reason of the alleged failure to deliver water. Seepage would be relevant only if it were the proximate cause of the failure of the north canal. It was not and the court specifically held that the evidence did not disclose negligence on the part of the United States. Efforts of appellants to rely upon those authorities simply disclose the lack of any authorities to support their contention that the trial court should be reversed. Further comment is unnecessary. Appellants failed to establish that negligence on the part of the United States was the proximate cause of their alleged damage. Having thus failed, the trial court, premised upon the cited authorities, properly entered judgment for the United States.

III

As the United States had no knowledge of the cause of the failure of the north canal it may not be charged with negligence

The trial court specifically found that: "The defendant [United States], based on its knowledge of the construction, operation, and maintenance of the canal under its system of inspection, was not bound to anticipate the breaks" [111] in the north canal. More-

[110] Appellants' Opening Brief, pages 36–41.

[111] Finding of Fact No. 14, R. 95.

over, the trial court found that: "at the time the first repair was made, the defendant [United States] did not know the cause of the first break, and that defendant [United States] did not know of anything that would cause it to anticipate the occurrence of the second break."[112] It was on the basis of the facts upon which those specific findings were made that Judge Fee in his opinion declared: "At that time [when the first break occurred], no one knew of the weaknesses of the structure or what caused the difficulty. It was only after the second break that the phenomenon, which unquestionably caused both breaks, was discovered."[113] There was no knowledge on the part of the United States that would cause concern over the integrity of the north canal.[114] Appellants offered no proof that the United States had knowledge. Rather, in an effort to overcome their failure to prove knowledge, appellants declare (1) the United States had actual notice of a dangerous condition;[115] (2) the United States was bound to anticipate the

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[112] Finding of Fact No. 16, R. 96.

[113] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 69. Respecting the lack of knowledge on the part of the United States as to the cause of the failures of the north canal please refer to the discussion above under the heading of, "At No Time Had the United States Knowledge that would cause it to Anticipate That the North Canal would fail in the Areas in which it did," at page 32 of this brief. There will be found full documentation of the evidence upon which the findings of the trial court on the subject are premised.

[114] Please refer to comments and documentation under the heading of "Inspection" at page 24 of this brief.

[115] Appellants' Opening Brief, pp. 80–83.

break.[116] Findings of the trial court premised on an abundance of substantial evidence from creditable witnesses dispose of the contention numbered (1).[117] Those findings and the documentation refute entirely the contention of actual knowledge or notice which was the equivalent of knowledge. Equally clear is the fact that the United States was not bound to anticipate the breaks. To repeat, the trial court found: "The evidence established * * * that at the time the first repair was made, the defendant [United States] did not know the cause of the first break, and that defendant [United States] did not know of anything that would cause it to anticipate the occurrence of the second break."[118] In most lucid terms the trial court points out that the presence of seepage along the canal was well known to the whole countryside and had anyone believed, especially those dependent upon the canal, that it evidenced damage to the structure, the matter would have been reported to the United States. The warning, had there been one, would have been in the record. Yet, states the trial court: "There is no such testimony in the record. There was nothing then in any of these conditions which would require a person, in the exercise of ordinary care, to anticipate a break because of the

[116] Appellants' Opening Brief, pp. 84–93.

[117] Please refer to comments and documentation under the headings "Inspection" at page 24 of this brief; "Operation and Maintenance" at page 26 of this brief; "At No Time Had the United States Knowledge that would cause it to Anticipate that the North Canal would fail in the Areas in which it did," at page 32 of this brief.

[118] Finding of Fact No. 16, R. 96.

circumstances mentioned."[119] Witnesses for the United States testified they had no knowledge, no warning, that a break was imminent. As emphasized, the canal was twice patrolled on the day of its failure and within a half hour of when the break occurred.[120] That testimony stands in the record unrefuted and unchallenged. Manifestly, therefore, the trial court did not err in finding as it did that the United States was without knowledge as to the cause of the first break, and did not know of anything that would cause it to anticipate the occurrence of the second break. For reasons previously reviewed those findings of the trial court should not be reversed on appeal. Accordingly, those findings declaring that the United States had no knowledge of the first break or information which would cause it to anticipate the second break exonerate the United States of any charge of negligence. Lack of knowledge of the factors giving rise to the occurrences upon which appellants predicate their claims precludes recovery in negligence. That principle was well stated in these terms by the Supreme Court of the State of Oregon in a recent decision: "A man cannot be held responsible on the theory of negligence for an injury from the act or omission on his part unless it appears that he had knowledge or reasonably was charged with knowledge that the act or omission involved damage

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[119] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 68.

[120] R. 759, Testimony Otto S. Pettet; R. 696, Testimony James Spofford. See also statement and documentation on page 11 of this brief.

to another."[121] That sound principle has virtually universal recognition. It is a principle grounded on sound logic. It is inherent in the law of negligence, for as stated: "Fundamentally, the duty of a person to use care and his liability for negligence depend upon the tendency of his acts under the circumstances as they are known or should be known to him. The foundation of liability for negligence is knowledge—or what is deemed in law to be the same thing; opportunity by the exercise of reasonable diligence to acquire knowledge—of the peril which subsequently results in injury."[122]

It is, therefore, reiterated that the appellants have failed completely to prove knowledge on the part of the United States of the cause of either the first or second breaks and they have thus failed to prove negligence against the United States and relief was properly denied them by the trial court.

IV

The burden of proof was on the appellants to establish that the United States was negligent, and they have failed to do so—the doctrine of res ipsa loquitur has no application to cases like these involving the failure to deliver water

"Since the burden of proof lay on plaintiffs [appellants] to establish cause and damage as a proximate result, no liability can be found in this state of the record. In view of the nature of the duty to deliver water, res ipsa loquitur does not apply."[123]

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[121] *Belknap* v. *Klaumann*, 181 Ore. 1, 178, P. 2d 154, 155 (1947).

[122] 38 Am. Jur., Negligence, sec. 23.

[123] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 65.

Judge Fee, by that declaration, recognized the true character of the claims of appellants. Simply stated, these appellants sued the United States because water did not reach their headgates. Here there was no encroachment upon their lands, no flooding, no seepage or trespass. Their sole complaint is that they did not receive water for a short period of time when they desired it. Manifestly, under the circumstances, the trial court was correct in holding that the principle of res ipsa loquitur should not apply. Appellants are unable to cite a failure-to-deliver-water case where the doctrine of res ipsa loquitur has been followed. Highly significant is the fact that the seepage cases cited by appellants required proof of negligence.[124] From one of the cases heavily relied upon by appellants,[125] the court declared:

> "The construction of ditches is one of the customary and recognized methods of appropriating water, and conveying the same for use in irrigation and for other necessary purposes. It is the method more generally, and indeed, almost universally, employed. While those engaged in such an undertaking, attended with possible risks to others, should be answerable for the conduct thereof with diligence proportioned to the apparent risk, there is no substantial reason, we think, for holding them accountable as insurers, nor for injuries not attributable to some fault or negligence on their part."

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[124] Appellants' Opening Brief, pp. 36–41.

[125] Appellants' Opening Brief, p. 39, citing *Howell* v. *Big Horn Basin Colonization Co.*, 14 Wyo. 14, 81 Pac. 785, 790.

Again from one of the seepage cases cited by appellants, this statement is taken: "If, in the actual operation of a canal, sudden and unexpected damage results by reason of some hidden defect which could not reasonably have been foreseen, the owner would not be liable in damages, because he is not an insurer, but chargeable only in case of negligence." [126] This Court, in regard to flooding cases, specifically declared: "Liability for damage is not to be assumed without proof of some fault or negligence on the part of the defendants." [127]

In regard to liability for damages from the failure of an irrigation canal this succinct and highly important statement has been authoritatively made regarding the rule in the arid West: "The ditch owner is not liable merely because the break or escape occurred, but only if it occurred through his negligence. Negligence must be shown. It is not even a case of res ipsa loquitur and negligence is not presumed from the mere fact that a break or escape occurred. The ordinary rule of negligence, that there must be a failure to use the care which an ordinary prudent man would have taken under the circumstances, applies." [128] Thus, the doctrine of res ipsa loquitur has been rejected in seepage and in flooding cases in the West. It necessarily follows, therefore,

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[126] Appellants' Opening Brief, p. 36; *Tormey* v. *Anderson-Cottonwood Irr. Dist.*, 53 Cal. App. 559, 200 Pac. 814, 816 (1921).

[127] *Eikland, et al.*, v. *Casey, et al.*, 290 Fed. 880, 882 (C. A. 9, 1923).

[128] Wiel on Water Rights in the Western States, 3d ed., vol. 1, sec. 461, p. 489; see also *Jacoby* v. *Gillette*, 174 P. 2d 505 (1946); 169 A. L. R. 502, 510.

that the doctrine would not be adhered to in cases such as these where the sole charge is that water was not delivered. Uniformly the cases, such as these, involving the failure to deliver water have required the proof of negligence. They have applied the ordinary rule of negligence that there must be a failure to use the care which an ordinary prudent man would have used under the circumstances.[129] The court, having reviewed certain instructions given by the lower court, quoted with favor the following excerpt: "It was the defendant's duty to use reasonable care and diligence in maintaining its canal and keeping it supplied with water, * * *."[130] That principle has been adhered to in other jurisdictions in the West where irrigation is essential to successful agricultural operations.[131] An examination of the authorities respecting the alleged failure to deliver water in regard to irrigation districts indicates that the same degree of care is required of them as is required of ditch companies.[132]

Efforts of appellants to force an analogy between these cases involving the failure to deliver water and the cases cited involving death by high voltage wires, railroad accidents, flooding and similar cases simply

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[129] *Rayborn* v. *Salmon River Canal Co.*, 50 Idaho 297, 295 Pac. 1001, 1003 (1931).

[130] *Hyink* v. *Low Line Irr. Co.*, 62 Mont. 401, 205 Pac. 236, 238 (1922).

[131] *Burtenshaw* v. *Bountiful Irr. Co.*, 90 Utah 196, 61 P. 2d 312 (1936). See also *Berg* v. *Yakima Valley Canal Co.*, 83 Wash. 451, 145 Pac. 619 (1915); L. R. A. 1915 D.

[132] *Six* v. *Bridgeport Irr. Dist.*, 105 Neb. 254, 179 N. W. 1014 (1920); See cases 69 A. L. R. 1238; 160 A. L. R. 1179.

reveal the dearth of authority to support their contention that the doctrine of res ipsa loquitur should be applied in cases involving only the question of failure to deliver water. Appellants, failing to prove their case, seek to have this Court declare that one who operates a ditch in the arid West is an insurer that water will be delivered. That doctrine, as revealed above, has been consistently rejected by the courts.

To be noted in passing is the well established doctrine that "The res ipsa loquitur rule does not apply where it appears that the accident was due to a cause beyond the control of the defendant, such as the presence of vis major * * *. Nor does it apply where an unexplained accident may be attributable to one of several causes, for some of which the defendant is not responsible." [133]

Assuming solely for purposes of argument that the doctrine of res ipsa loquitur applies to failure-to-deliver-water cases, it is apparent that the facts adduced by the United States relieve it of liability. That statement is predicated on the declaration by the trial court that the cause of the failure of the north canal was a stratum situated far below the floor of the canal concerning which the United States had no knowledge. On the subject the trial court stated it was that structure unknown to the United States "which unquestionably caused both breaks." [134]

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[133] 38 Am. Jur., Negligence, sec. 303, p. 1000.

[134] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 69.

Premised on the preceding review of facts and law, Judge Fee was correct beyond question in declaring that the doctrine of res ipsa loquitur should not apply when, as here, the claim is premised upon the failure of water to be delivered. Thus the burden of proof was on the appellants to prove negligence. For as authoritatively stated: "In an action founded upon negligence, the burden of proof, of course, rests upon the plaintiff. He must make out his case by a fair preponderance of evidence."[135] Continuing, the cited authority makes this statement which, as will be observed, is extremely pertinent: "It is certainly the duty of plaintiff to prove affirmatively that the defendant has been negligent. He must also prove facts from which it can fairly be inferred that the defendant's negligence was the cause, and the proximate cause, of the injury. Mere surmise or conjecture, on any of these points, will not do."[136] Those principles apply to the cases here under consideration.

Appellants, having failed to prove negligence, the trial court found that: "Respecting both the first and second breaks of the north canal the plaintiff(s) [appellants] failed to prove that the defendant [United States] did not use reasonable care in the construction, maintenance, operation, inspection, or repair of said canal."[137] It likewise found that: "The

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[135] Shearman & Redfield on Negligence, rev. ed., vol. 1, sec. 52, p. 136.

[136] Shearman & Redfield on Negligence, rev. ed., vol. 1, sec. 52, p. 137.

[137] Finding of Fact No. 18, R. 96.

burden of proof lay on plaintiff(s) [appellants] * * *.[138] "The evidence does not establish that the proximate cause of plaintiff(s)' [appellants'] alleged damage was caused by any negligent act or omission on the part of the defendant [United States]."[139] "Plaintiff(s) [appellants] have failed to establish that the defendant [United States] did not exercise reasonable care in the construction, operation, maintenance, repair, or inspection of the north canal at all times in controversy."[140] Having failed to sustain their burden of proving that the United States was negligent, it is respectfully submitted, precludes reversal on appeal.

V

The United States fulfilled the duty incumbent upon it to exercise ordinary care in the construction, inspection, operation, and maintenance, investigation prior to repair, repair of the north canal, and all other aspects

These are failure-to-deliver-water cases. As stated, they differ fundamentally from flooding or seepage cases where the complainants' lands are encroached upon by water. Thus seepage is relevant only if it was the proximate cause of the breach of the north canal. Elements involving construction, maintenance, operation or repair have significance only if they have causal connection with the failure of the water to reach the laterals of the appellants. Beyond question, the burden of proof was on the appellants to prove negligence. After a most thorough trial of the facts and

[138] Conclusion of Law No. 2, R. 97.
[139] Conclusion of Law No. 3, R. 97.
[140] Conclusion of Law No. 4, R. 97.

an on-the-ground investigation, the trial court declared there was no proof of negligence on the part of the United States.

However, too great emphasis may not be placed upon the fact that the record discloses affirmatively that the United States exercised reasonable care under the circumstances in regard to every factor of the case. Having exercised reasonable care in every respect, the United States fulfilled the obligation imposed upon it by the law. For, "actionable negligence is the failure of one owing a duty to another to do what a reasonable and prudent person would ordinarily have done under the circumstances, or doing what such a person would not have done, which omission or commission is the proximate cause of injury to the other."[141] Few precepts of the law are more firmly established. Applying that criterion to the present case, it is manifest from the record that the United States met that standard in every respect. Relative to the construction of the north canal, the appellants' principal expert witness testified as follows:

> Q. What is the general practice concerning their [canal] construction?
>
> A. I think it [the north canal] follows the general practice on this canal.
>
> Q. In other words, this is the general practice of constructing canals in the area?
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> A. Yes, sir; I think so.[142]

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[141] 38 Am. Jur., Negligence, sec. 2, p. 643.

[142] R. 358, Testimony Allen C. Merritt.

> Q. The fact that the segment of the North Canal breached stood for approximately eleven years prior to the alleged failure is evidence of reasonable construction, is it not?
>
> A. I would say so, yes, sir.[143]

That the United States followed the general practice in the area when it constructed the north canal is free from doubt. In substance Oregon's highest court has declared that there can be no liability in the absence of proof of negligence, and "negligence is the absence of care according to the circumstances."[144] It has likewise been authoritatively stated that, "The standard by which the conduct of a person in a particular situation is judged in determining whether he was negligent is the care which an ordinarily prudent person would have exercised under like circumstances."[145] In measuring due care there is no immutable criterion. Nevertheless "General usage or custom may be shown in order to establish a standard of diligence to which the party sought to be charged is required to conform."[146] Further, "one cannot ordinarily be said to be negligent if he does that which ordinary men, like situated, do."[147] Affirmative proof, therefore, is in the record that the United States in the construction of the north canal met the standard of care which the law requires.

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[143] R. 376, Testimony Allen C. Merritt.

[144] *Rice* v. *City of Portland*, 141 Ore. 205, 213, 7 P. 2d 989, 17 P. 2d 562 (1932).

[145] 38 Am. Jur., Negligence, sec. 30.

[146] Shearman and Redfield, Negligence, rev. ed., sec. 10, p. 18.

[147] *Grammer* v. *Mid-Continent Petroleum Corporation*, 71 F. 2d 38, 40 (C. A. 10, 1934), cert. denied 293 U. S. 571 (1934).

In regard to inspection, operation and maintenance and repair, the appellants offered no evidence that the United States had not met the standard of care required. Premised upon the evidence adduced by the United States the court, having reviewed the fact that the north canal was inspected twice daily and had been inspected a half hour before the failure, declared: "This is shown to have been the usual custom of the Government in regard to inspection. It was unquestionably adequate to fulfill the duty of exercise of ordinary care."[148] As to operation and maintenance, the court stated: "The Court believes the operation of the canal at full head at a time when everyone was crying for water was in the exercise of ordinary care."[149] As to inspection prior to repair the trial court specifically found: "The evidence established that at the time of making the first repair, the defendant [United States] made an investigation to ascertain the cause of the break and exercised reasonable care in that regard; * * *."[150] Regarding repair, the trial court specifically found that: "The evidence established that the defendant [United States], acting in an emergency, took prompt and efficient methods to rebuild * * * the north canal * * * and the work of repair of the break was done and completed promptly, with reasonable care and in a good workmanlike manner."[151] Thus in

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[148] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 68.

[149] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 66.

[150] Finding of Fact No. 16, R. 96.

[151] Finding of Fact No. 15, R. 96.

every element of the case the record shows affirmatively that the United States exercised reasonable care.[152] In the light of the proof that the United States exercised reasonable care in every respect it is manifest that the trial court properly denied appellants relief on the charge of negligence, for by so doing the United States refuted the charge of negligence. It proved that it did what a prudent man would have done under the circumstances of the situation—the very reverse of negligence.[153] Though the burden of proof was on appellants and they failed in their burden,[154] the United States rebutted any inference of negligence by its proof of exercise of reasonable care. As stated in a highly pertinent and recent case: "The defendant by showing how the accident happened may establish that it was not due to his fault. Shearman and Redfield on Negligence, Rev. Ed., pages 154–155. It is not necessary, however, for the defendant to go that far. He need not show how the accident happened, if without doing so he can establish that he did his full duty under the circumstances to guard against it."[155] Continuing, the court stated: "Any inference of negligence of the defendant which may have arisen because of the mere happening of the accident has been effectively rebutted. To hold otherwise would be to make the defendant an insurer regardless of negligence."

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[152] For a full review of each of the elements discussed and documentation from the record, please refer to pages 21 through 32.

[153] *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67 (1942).

[154] R. 96, 97.

[155] *Great Atlantic & Pacific Tea Co.* v. *Kennebec Water Dist.*, 140 Me. 166, 34 Atl. 2d 729, 730 (1943).

Highly significant, therefore, is the finding of the trial court that: "at the time the first repair was made, the defendant [United States] did not know the cause of the first break, and * * * defendant [United States] did not know of anything that would cause it to anticipate the occurrence of the second break."[156] That the United States or any other canal operator is not an insurer to those who receive water from a canal is too clear for question. For even where lands have been flooded as distinguished from the failure to deliver water, this Court has specifically declared that a canal owner is not an insurer but rather: "Liability for damage is not to be assumed without proof of some fault or negligence on the part of the defendants."[157] Here not only did the appellants fail to prove negligence—the United States proved that it was not negligent, having exercised reasonable care relative to every aspect of the case.

VI

Having failed to prove negligence, the appellants may not on appeal change their claims from tort to contract[158]

Appellants failed to prove negligence on the part of the United States. Thus confronted, they now assert

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[156] Finding of Fact No. 16, R. 96.

[157] *Eikland et al.* v. *Casey et al.*, 290 Fed. 880, 882 (C. A. 9, 1923).

[158] Cited by appellants at the outset of their argument is the case of *Ickes* v. *Fox*, 300 U. S. 82 (1936). As the sole question in that action was whether the United States was an indispensable party to an injunction suit against the Secretary of the Interior it has no pertinence and no bearing upon the matter before the Court.

that their claims are for breach of contract.[158a] That position is taken although the cases in question were all tried under the Federal Tort Claims Act.[159] Manifestly, at this stage of the proceeding, these consolidated cases may not now be brought within the purview of the so-called Tucker Act.[160] Two provisions of that act make unavoidable that conclusion: (1) The waiver of sovereign immunity of the United States contained in the act insofar as here pertinent, relates to claims "upon express or implied contract * * * not sounding in tort." (2) No claim exceeding $10,000 may be tried in the district court under that waiver of immunity.[161]

In regard to suits against the United States under the Tucker Act, this statement has been made: "The United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the claim as upon an implied con-

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[158a] Appellants' Opening Brief, pp. 15–36.

[159] 28 U. S. C. 1346 (b).

[160] 28 U. S. C. 1346 (a).

[161] 28 U. S. C. 1346 (a): "The district courts shall have original jurisdiction concurrent with the Court of Claims, of: * * * (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

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tract." [162] It was undoubtedly the fact that the Tucker Act did not permit suits against the United States in tort which caused Congress to enact the "Federal Tort Claims Act." It is unnecessary to labor further the proposition that appellants must bring their claims within the purview of some specific waiver of immunity when they proceed against the United States.[163] It is only when the claimants' cases come clearly within the purview of the waiver of immunity and it is a question of granting full relief that the courts have not adhered to the strict rules discussed above.[164] Here it is manifest that the cases do not come within the waiver of immunity under the Tucker Act which specifically excludes claims sounding in tort. It cannot be denied that these cases sound in tort. Appellants brought them against the United States as torts. They did not assert that their claims were in contract until the trial court declared there was no negligence on the part of the United States. As they are tort claims the clear expression of Congress that the Tucker Act does not apply to claims sounding in tort would preclude the appellants from now claiming under that act.[165]

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[162] *Hill* v. *United States*, 149 U. S. 593, 598 (1892); see also *Schillinger* v. *United States*, 155 U. S. 163 (1894).

[163] *Belknap* v. *Schild*, 161 U. S. 10, 16 (1895); *United States* v. *Shaw*, 309 U. S. 495, 502 (1939).

[164] *Brooks* v. *United States*, 337 U. S. 49, 51 (1949); *United States* v. *Aetna Life Insurance Co.*, 338 U. S. 366 (1949); *Feres* v. *United States*, October term, 1950, decided December 4, 1950; *United States* v. *Yellow Cab*, October term, 1950, decided February 26, 1951.

[165] *United States* v. *Sherwood*, 312 U. S. 584 (1940).

Respecting the limitation of the jurisdiction of the district court under the Tucker Act to claims not exceeding $10,000 this salient fact is presented: Of the 51 appellants' claims before this Court 5 of them exceed $10,000.[166] Those claims exceeding $10,000 were consolidated with the others for trial below. Those cases were consolidated with the others here on appeal.

In substance, therefore, appellants now seek to deny that the forum in which they sought relief had jurisdiction. If their contentions are correct it is respectfully submitted that this Court on appeal would necessarily be without jurisdiction. It is denied, however, that appellants could create such an incongruous situation—Appellants sued in tort, the trial court found no negligence on the part of the United States and entered judgments for it. Those judgments should be affirmed.

VII

The United States could not have been negligent in regard to appellants as it has no contract with them and owes them no duty—no negligence in absence of duty

Quite aside from the jurisdictional aspect raised by appellants' contention that their claims are for a breach of contract rather than tort, there are two complete defenses to their claims which appellants leave unchallenged:

1. The appellants have no contract with the United States—their contracts are with the irrigation district.[167]

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[166] Howard Bybee and B. G. Bybee; John Allmer; James A. Davis; Lem Wilson; Emmett Smith.

[167] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 58; Findings of Fact Nos. 3, 6, 7, R. 90, 93.

2. The contract between the United States and the irrigation districts specifically waives liability on the part of the United States for shortages of water "on account of drought, inaccuracy in distribution or other causes."[168] Appellants accepted, confirmed and consented to that contract specifically waiving any liability on the part of the United States for any shortage of water.[169]

As appellants have no contract with the United States there can be no duty owing to them by the United States. That statement is premised upon the fundamental principle that: "Actionable negligence consists of a duty, a violation thereof, and a consequent injury. The absence of any one of the three elements is fatal to the claim."[170] There are few rules of law more firmly established. It has been recognized by the Supreme Court of the United States[171] and by the Supreme Court of the State of Oregon.[172] Further, the duty, the breach of which constitutes negligence, must be a legal duty.[173] As stated by the Supreme Court of the State of Oregon, a legal duty "may

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[168] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 58; Finding of Fact No. 4, R. 92.

[169] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 58; Finding of Fact No. 6, R. 93.

[170] Shearman and Redfield on Negligence, rev. ed., vol. 1, sec. 3, p. 9.

[171] *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U. S. 220 (1912).

[172] *Sanders* v. *California-Oregon Power Co.*, 133 Ore. 571, 291 Pac. 365 (1930).

[173] Shearman & Redfield on Negligence, rev. ed., vol. 1, p. 12, par. 5.

arise out of contractual relations or it may be imposed by law.[174] In a case involving alleged negligence in the operation of an irrigation system the statement was made: "It is elementary that actionable negligence only arises from the violation of a duty to the injured party."[175] That principle was reiterated in a similar case in these terms: "This action is for tort. To recover, the plaintiff must show that the defendant owed him some duty which he failed or neglected to perform."[176]

As the facts will reveal, appellants have never entered into a contract with the United States. Nor has the United States entered into any contract pursuant to which the appellants could successfully assert rights as third-party beneficiaries. Having failed to disclose any privity with the United States they are unable to establish a duty arising by contract upon which to premise a claim recognized by the law.[177] There being no contractual duty owing to the appel-

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[174] *Sanders* v. *California-Oregon Power Co.*, *supra*, footnote 172.

[175] *Salt River Valley Water Users' Assn.* v. *Delaney*, 44 Ariz. 544, 39 P. 2d 625, 626 (1934).

39 P. 2d 625, 626 (1934).

[176] *Chavez* v. *Lopez*, 35 N. M. 61, 290 Pac. 741 (1930).

[177] *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U. S. 220 (1912).

Affirming 174 Fed. 764, 766 (C. A. 4, 1909); both the Supreme Court and the circuit court in the cited decisions discuss the fundamental tenet here involved. *Creedon* v. *Automatic Voting Mach. Corp.*, 243 App. Div. 339; 268 N. Y. 583; 198 N. E. 415 (1935). In the report appearing in 243 App. Div. 339 of the case last cited the court pointed out that plaintiff could not recover in tort by reason of the fact that he was unable to disclose a duty owing to him as he was neither a party to the contract nor entitled to recover as a beneficiary under the contract pursuant to the doctrine of *Lawrence* v. *Fox*.

lants by the United States they are not entitled to recover from the United States as they have failed to prove the most essential element of negligence—duty.

To be observed is the fact that the trial court did not find a duty under the contract but rather stated that the obligation of the United States was that of a common carrier. As the trial court found that there was no negligence the point is not fundamental to the decision. It is noted, however, that the United States is a sovereign of delegated powers and may act only as a sovereign.[178] It has not been empowered to function as a common carrier, public utility, irrigation district or other agency engaged in supplying water to users. Thus it may not assume the responsibilities of agencies of that character.[179] In addition, the State in the exercise of its police power may not impose upon the United States a duty to supply water to the plaintiffs.[180] Thus the reference to State police regulations by appellants has no application here. Certainly it may not be contended that the Federal Tort Claims Act subjected the United States to the control of the State legislatures. Moreover, the sections of State law cited by appellants relate to

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[178] *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 102; *Federal Crop Insurance Corp.* v. *Merrill, et al.*, 332 U. S. 380, 383 (1947).

[179] *United States* v. *Curtiss-Wright Export Co.*, 299 U. S. 304 (1936). That case defines in concise language the nature and the limitations of the powers enjoyed by the Federal Government.

[180] *Arizona* v. *California*, 283 U. S. 423, 451 (1930); *Hunt* v. *United States*, 278 U. S. 96 (1928); *Johnson* v. *Maryland*, 254 U. S. 51 (1920).

flooding and not to failure to deliver water, the sole questions here involved.

Pertinent and much to the point are the comments of the Supreme Court of the State of Nebraska as to the relationship of the United States to the irrigation districts and to the water users under contracts the same in substance as the contract which the United States had in these cases with the irrigation districts. The Nebraska court stated: "The contention of the plaintiff that the district is operating an irrigation system through the instrumentality of the United States is untenable."[181] That statement would apply equally to the contention that the United States is a common carrier of water for the appellants. To labor the proposition further that the United States as a sovereign of delegated powers could not be a common carrier and that the Federal Tort Claims Act could not so constitute it would in no way aid this Court. Suffice to say that the trial court found no evidence of negligence on the part of the United States and dismissed the claims on the merits.

Apparently ignoring the fact that they had no contract with the United States the appellants nevertheless devote a large part of their brief to the question of contract.[182] It is denied, as above stated, that there is a contract between them and the United States. Assuming, however, solely for the purposes of argument that there was a contract between the United States and the appellants, the appellants are,

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[181] *Livanis* v. *Northport Irr. Dist.*, 121 Neb. 777, 238 N. W. 757 (1931).

[182] Appellants' Opening Brief, pp. 14–36.

nevertheless, precluded from recovery. That statement is premised upon the fact that appellants not only failed to prove negligence on the part of the United States but the evidence conclusively proved that the United States had exercised reasonable care in every aspect of the case. Having failed to prove negligence on the part of the United States, there is no basis for recovery. Reference in that regard is made to the authorities upon which appellants rely.[183] To be noted is this fact: In every instance where the statement is made that a duty may arise by contract upon which a claim in negligence may be predicated is the added statement that negligence must be proved.[184] That is manifest from the authorities cited by appellants which specifically declare that a requisite to such an action "is negligent failure to" perform the contract.[185] Here there was no negligence. Thus the authorities cited by appellants on the subject are without meaning.

VIII

Appellants have waived any liability on the part of the United States by reason of shortages in the supply of water

There was no negligence on the part of the United States. There was no contract between the United States and appellants, thus there is no privity between the United States and appellants upon which a duty

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[183] Appellants' Opening Brief, p. 18 et seq.

[184] Appellants' Opening Brief, p. 18, pp. 22–23 citing 38 Am. Jur. 661–662 sec. 20.

[185] See Shearman and Redfield on Negligence, rev. ed., vol. 1, p. 15 et seq.; 38 Am. Jur., Negligence, 661 et seq.

could arise.[186] Assuming, however, that those two insurmountable barriers to appellants' recovery were removed, there remains a final obstacle preventing recovery on their part.

As stated, appellants have no contract with the United States. The United States has contracts with the irrigation districts comprising the Owyhee Reclamation Project. Appellants confirmed and consented to the contracts between the United States and the irrigation districts. Courts of competent jurisdiction approved those contracts. Those contracts consented to and confirmed by appellants themselves provided that the United States would not be liable for shortages in the supply of water for irrigation "on account of drought, inaccuracy in distribution or other causes."[187] That unqualified waiver of liability for the failure to deliver water precludes recovery. Had there been negligence on the part of the United States, and there was not; had there been a contract between the appellants and the United States which would give rise to a duty from the United States to them, and there was not; appellants would still be precluded from recovery. That waiver of liability is a complete and effective bar to any recovery by appellants against the United States.

CONCLUSION

The trial court found no negligence on the part of the United States. Appellants had expressly

[186] Shearman and Redfield on Negligence, rev. ed., vol. 1, p. 16.

[187] Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 58; Finding of Fact No. 4, R. 92.

waived any claim for liability against the United States had there existed facts upon which negligence could have been predicated. Accordingly, it is respectfully submitted that this Court upon appeal should affirm the trial court.

A. DEVITT VANECH,
Assistant Attorney General.

HENRY L. HESS,
United States Attorney,
Portland, Oreg.

WILLIAM H. VEEDER,
Special Assistant to the Attorney General,
Washington, D. C.

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